



## Indian Competition Law Roundup: August 2020

In this Roundup, we highlight the main developments in Indian competition law in August 2020.

### Anti-Competitive Agreements

#### *LPG Cylinder Cases Closed*

The Competition Commission of India (CCI) closed two cases of alleged cartelization by manufacturers of LPG cylinders in response to tenders floated by *Bharat Petroleum Corporation Limited (BPCL)*.<sup>1</sup> The investigating Director General (DG) had found that certain of the opposite parties had colluded in fixing prices and were therefore in breach of Section 3 of the Competition Act, 2002 (*Competition Act*). The CCI referred to the judgment of the Supreme Court in the *Rajasthan Cylinders* case,<sup>2</sup> in relation to another order involving LPG Cylinders, where the Court held that LPG cylinder manufacturers had demonstrated that parallel pricing was not the result of a concerted practice but stemmed from the oligopsonistic structure of the market where the buyers determined the price they would pay. In these two cases too, BPCL had negotiated with the bidders and had decided the price at which the tenders were to be awarded. The CCI stated that this was a market largely driven and controlled by oil marketing companies (including BPCL) and the LPG

cylinder manufacturers had to adhere to the framework and tender conditions stipulated by the buyers; there was no scope for innovation, efficiency gains or product differentiation and price discrimination.

### Abuse of Dominant Position

#### *No Abuse by WhatsApp in Digital Pay*

The CCI dismissed at *prima facie* stage a complaint that *WhatsApp/Facebook* had abused their dominant position in the “market for internet-based messaging application through smartphone” to manipulate the “market for UPI<sup>3</sup> enabled digital payment applications”.<sup>4</sup> The CCI *prima facie* found WhatsApp to be dominant in the narrowly defined “market for Over-The-Top messaging apps through smartphones”. However, it considered that WhatsApp had not abused this dominant position. It rejected arguments that the automatic inclusion of the “WhatsApp Pay” feature with the “WhatsApp” application was abusive since the user continued to have full discretion whether or not to use it or other payments features/apps. It rejected allegations of tying, finding that there was no requirement that users used WhatsApp Pay and that, given the recent entry of WhatsApp Pay in the market, it was too premature to judge whether competition would be

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<sup>1</sup> *In Re: Formation of cartel in the supply of 14.2 kg LPG cylinders*, CCI, *Suo Motu* Case No. 05 of 2014 (20 August 2020) and *Suo Motu* Case No. 09 of 2014 (27 August 2020).

<sup>2</sup> *Rajasthan Cylinder and Containers Limited v Union of India and another, etc.*, Supreme Court, Civil Appeal No. 3546 of 2014 (1 October 2018).

<sup>3</sup> Unified Payments Interface.

<sup>4</sup> *Harshita Chawla v WhatsApp Inc. and Facebook Inc.*, CCI, Case No. 15 of 2020 (18 August 2020).



affected. The CCI also rejected allegations of a leveraging abuse, finding that there was vigorous competition in the UPI payments market and it was implausible that WhatsApp would automatically garner market share simply because it had pre-installed the feature. Finally, the CCI rejected allegations of misuse of data and of non-compliance with norms on data localisation/storage, finding that no competition concerns were raised. The CCI therefore directed that the file be closed.

It may be noted that the CCI allowed the case to proceed even though the informant – a practising advocate – was not an “aggrieved party” able to show injury or invasion of legal rights. Although the National Company Law Appellate Tribunal had recently taken the view that only an “aggrieved party” could lodge an information with the CCI,<sup>5</sup> the CCI relied on the legislation and other orders of the Appellate Tribunal to hold that the Informant need not always be an “aggrieved party”.

## Natural Justice and Due Process

### *CCI Bound to Give Reasons in Prima Facie Order*

The Gujarat High Court quashed a *prima facie* order of the CCI directing an investigation by the DG of alleged bid rigging in a tender for the printing of school textbooks.<sup>6</sup> The petitioner, *Vardayani Offset*, argued that the CCI had violated rules of natural justice by failing to provide the information and other documents at the outset and that the *prima facie* order – which was eventually provided by the DG in a redacted version – was bereft of reasons. The petitioner also argued that the DG’s investigation report was perverse.

In a lengthy reasoned judgment, the High Court found that the *prima facie* order did not provide even minimal reasons for the CCI reaching its view that there was a breach of Section 3 of the Competition Act; it was not sufficient for the CCI to say that it was “apparent” that the bidders’ action was covered by Section 3. However, the

Court dismissed arguments of the petitioner that it should have been informed at the outset of the allegations, and provided with the information and other documents to allow it to understand the nature of the case against it and to address allegations against it in the course of the investigation. Relying on the Supreme Court judgment in the *SAIL* case<sup>7</sup> and other cases, the High Court stated that the proceedings before the DG were not governed by the principles of natural justice and that the petitioner could be properly heard by the CCI once the DG’s report was received. It also declined to consider arguments that the DG’s report was perverse, stating that such arguments could be considered by the CCI and that it would not sit in appeal over the DG’s report. The High Court therefore quashed the order *only* on the ground that the order did not record reasons. It left it open to the CCI to record such reasons and to pass a fresh order within four weeks of receiving the High Court’s order.

## Merger Control

### *Peugeot/Fiat Chrysler Merger Approved*

The CCI approved the merger of automobile manufacturers *Peugeot* and *Fiat Chrysler*.<sup>8</sup> The CCI identified a potential horizontal overlap in that Peugeot, hitherto not manufacturing or selling in India, was proposing to enter into the Indian automobile market in the first quarter of 2021. Although the CCI considered that the market in India could be broadly segmented into passenger cars, utility vehicles and vans, and sub-segmented on the basis of factors such as price and features, it left the exact definition of the market open. Given the overall presence of the parties and the presence of other players, there was no competition concern however the market was defined. The CCI also considered the presence of the parties in the automotive financing segment and, given the nature of the parties’ current/future involvement in this segment and the presence of several banks and other financial institutions, concluded that this was unlikely to raise competition concerns in India.

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<sup>5</sup> *Samir Agrawal v CCI and others*, NCLAT, Appeal No. 11 of 2019 (29 May 2020).

<sup>6</sup> *Vardayani Offset v CCI and others*, High Court of Gujarat, Special C.A. No 8101 of 2020 (18 August 2020).

<sup>7</sup> *CCI v Steel Authority of India Ltd.*, Supreme Court, ([2010] (10) SCC 744).

<sup>8</sup> *Peugeot S.A & Fiat Chrysler Automobiles N.V.*, CCI, Combination Reg. No. C-29020/04/740 (4 June 2020).



# Competition Matters

## Company Reporting

### *Towards Increased Transparency*

The Ministry of Corporate Affairs published the Report of the *Committee on Business Sustainability Reporting (Committee)*.<sup>9</sup> In the context of the 2019 National Guidelines on Responsible Business Conduct, the Committee recommended a new reporting framework for companies called the *Business Responsibility and Sustainability Report (BRSR)* to serve as a single source for all non-financial disclosures. It is proposed that this should cover the 1000 largest listed companies in terms of market capitalisation and, in due course, unlisted companies. The Report covers a wide range of mandatory and voluntary disclosures. In the competition

sphere, it is proposed that companies be required to provide details of adverse judicial or regulatory orders, fines and penalties imposed, and appeals. They may also voluntarily provide details of corrective action taken by the company based on adverse orders from regulatory authorities. It is also proposed that companies provide information regarding consumer complaints in relation to restrictive trade practices under the Competition Act. Though the Competition Act does not mention “restrictive trade practices”, it is stated that these requirements are intended to cover conduct covered by Sections 3, 4 and 6 of the Competition Act, respectively addressing anti-competitive agreements, abuse of dominant position and merger control.

<sup>9</sup> Ministry of Corporate Affairs, *Report of the Committee on Business Sustainability Reporting* (8 May 2020, released 11 August 2020).

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